Supreme Court, U.S.
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No. 98-___

In The

Supreme Court of the United States

October Term, 1997

RICHARD E. FLESHMAN,

Petitioner,

v.

TOGO D. WEST, SECRETARY
OF VETERANS AFFAIRS,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Federal Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as the Federal Circuit has ruled, an interpretation of the veterans statutes by the Secretary of Veterans Affairs is entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), notwithstanding the rule recognized by this Court in *Brown* v. *Gardner*, 513 U.S. 115 (1994), that any ambiguity in the veterans statutes must be resolved in favor of the veteran.

2. Whether an unsigned but otherwise complete and proper application for veterans disability benefits is an "application" sufficient to preserve a veteran's effective date under 38 U.S.C. § 5110(b)(1) for an award of benefits.

PARTIES

There are no parties to this case other than those listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that the Court issue a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the Federal Circuit is published at 138 F.3d 1429 and is reproduced in the Appendix to this Petition ("Pet. App.") beginning at page 1a. The decision of the U.S. Court of Veterans Appeals is published at 9 Vet. App. 548 and appears at Pet. App. 12a-22a. The unpublished decision of the Board of Veterans Appeals appears at pages 23a-33a.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Federal Circuit were entered on March 11, 1998. No petition for rehearing was filed. On May 20, 1998, the Chief Justice extended the time for filing a petition for certiorari in this matter, to and including July 7, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Several statutes are involved in this proceeding. The first charges the Department of Veterans Affairs ("VA") with a duty (called a "duty to assist") requiring the

agency to provide, "to the maximum extent possible, aid and assistance" to veterans "in the preparation and presentation of claims." 38 U.S.C. § 7722(d); *see also id.* § 7721(a) (imposing on the VA the responsibility of "ensuring that all veterans (especially those who have been recently discharged . . .) are provided timely and appropriate assistance to aid and encourage them in applying for and obtaining . . . benefits").

The second states that "[t]he effective date of an award of disability compensation benefits to a veteran shall be the day following the date of the veteran's discharge or release [from military duty] if application therefor is received within one year from such date of discharge or release." *Id.* § 5110(b)(1). The third provides that "[i]f a claimant's application for benefits under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant of the evidence necessary to complete the application." *Id.* § 5103(a). The fourth provides that "[a] specific claim in the form prescribed by the Secretary . . . must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary." *Id.* § 5101(a).

STATEMENT OF THE CASE

Factual Background

Petitioner Richard E. Fleshman served honorably on active duty in the United States Army from October 9,

1984 to October 8, 1987. Record on Appeal ("R.") at 118.[1] On May 24, 1986, at twenty-one years of age, he fell twenty feet from a tower to the ground below. He was rushed to the emergency room at Womack Army Hospital, Fort Bragg, N.C., where it was discovered that he had a broken back. Specifically, he had a 50% compression fracture of the third lumbar vertebra ("L3"). R. at 32. He was placed in a body cast for approximately ninety days, followed by another roughly ninety days of wearing a back brace. R. at 105; *see also* R. at 32. He remained on convalescent and sick leave for forty days after the accident. R. at 1.

Although Mr. Fleshman was returned to duty on July 3, 1986, his duty was limited by strict medical restrictions. R. at 32. Later his treating physician warned him that, given his back injury, if he suffered another "extreme impact[ ]" to his back, there was a "good possibility" that paralysis would result. R. at 105. He completed the remaining eighteen months of his enlistment, even though his back "was in pain when moved or used in any strenuous situation." R. at 58; *see generally* R. at 5.

After his honorable discharge on October 8, 1987, R. at 118, Mr. Fleshman completed and submitted to the Department of Veterans Affairs ("VA") Regional Office in Cleveland, Ohio, the VA-designated application for disability benefits at separation from service. App. at A-33 to A-34. He answered all pertinent questions and provided all information requested on the form. *Id.* After stating

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[1] The "Record on Appeal" and "Supplemental Record on Appeal" refer to the formal record compiled by the parties and filed in the U.S. Court of Veterans Appeals.

his full name, date of birth and social security number, Mr. Fleshman's application informed the VA that on May 26, 1986, he had suffered an "injured back (L3 vertebrate compressed 50%)" while on active duty at Fort Bragg, North Carolina. *Id.* at A-33. He further informed the VA, through his completed application, that he had been treated for the injury at Womack Army Hospital. *Id.* The application was stamped "RECEIVED" by the VA Regional Office ("RO") on October 13, 1987. *Id.*

One month later, however, on November 24, 1987, the RO mailed a form letter addressed to Mr. Fleshman to 6472 Middleshire, Columbus, Ohio 43229, the same address listed on his DD-214. *Id.* at A-32. Two boxes were checked on the form. The first box carried the following message: "The evidence requested below should be submitted as soon as possible, preferable within 60 days, and in any case must be received in the VA within one year from the date of this letter; otherwise benefits, if entitlement is established, may not be paid prior to its receipt." *Id.* The second and last box checked indicated: "Please complete all items checked in red on the enclosed form(s) and return it to this office." *Id.* The "enclosed form" was the two-page application for benefits filed by Mr. Fleshman in October 1987, and three boxes were checked on the form: (1) "date signed," (2) "signature of claimant," and (3) "mailing address of claimant." *Id.* at A-34. The record reveals no follow-up calls or inquiries on the VA's part, and the one-year period elapsed without response from Mr. Fleshman. App. at A-8.

Over the ensuing years, his symptoms worsened, R. at 105, and on January 30, 1992, he submitted another application for disability benefits. *Id.* at A-35. The 1992

application conveyed precisely the same basic information that the 1987 application conveyed – namely, that he had suffered a disabling injury (a broken back) during active duty at Fort Bragg, North Carolina. *Compare* App. at A-33 to A-34 (1987 application) *with* App. at A-35 to A-38 (1992 application). The only material difference between the two applications was that the 1992 application was signed and dated, and bore a return address. *Id.* at A-8.

Procedural Background

Based on the results of a VA physical examination, the Rating Board assigned Mr. Fleshman's back injury a 20% disability rating. R. at 108. The RO granted his claim, so rated, but made the benefits effective on February 1, 1992. R. at 111-12. Mr. Fleshman appealed in timely fashion to the Board of Veterans Appeals ("BVA"), challenging the effective date ruling and the disability rating. The BVA affirmed in a written opinion dated June 23, 1994, but concluded that January 30, 1992 (the date of his second application) was the proper effective date. App. at A-24.

As for the effective date issue, the sole issue presented to the Federal Circuit below, the BVA stated that although it "[wa]s sympathetic to the veteran's claim," *id.* at A-29, his 1987 claim was "abandoned" under 38 C.F.R. § 3.158(a) and thus could not give rise to an October 1987 effective date on his 1992 claim pursuant to 38 U.S.C. § 5110(b)(1). By "fail[ing] to return a completed claim form despite the RO's request," the Board ruled, Mr.

Fleshman had "abandon[ed]" the 1987 claim – abandonment being defined as what happens when "the veteran has not provided requested information within a one-year period and no further action has commenced on the claim." App. at A-29 to A-30. Mr. Fleshman took a timely appeal to the Court of Veterans Appeals ("CVA").

Recognizing the importance of this case to the administration of the veterans administration scheme, the judge to which the case was assigned transfered the case, *sua sponte*, to a three-judge panel of the court for decision, as opposed to the usual single-judge disposition by unpublished opinion. Mr. Fleshman argued, among other things, that the BVA's sole ground for denying him an earlier effective date – namely, that his 1987 claim had been abandoned under 38 C.F.R. § 3.158(a) – was legally erroneous.

Instead of defending the BVA's abandonment ruling in the face of Mr. Fleshman's arguments, the Secretary presented an entirely new argument, not raised before or considered by the BVA, for affirmance. Denial of the earlier effective date was proper, the Secretary argued, because an unsigned application is not an application "in the form prescribed by the Secretary," as required by 38 U.S.C. § 5101(a). On November 22, 1996, the CVA issued a published opinion accepting the Secretary's argument on the effective date issue, but vacating and remanding the rating decision. Pet. App. 12a.

Even though a veteran is entitled to an effective date of the day following his discharge from active duty if an "application" is received within one year from his date of discharge, 38 U.S.C. § 5110(b)(1), and even though Mr. Fleshman's 1987 application was received within one

month of his discharge, the CVA ruled that his unsigned application was not an "application" at all but rather an "informal claim" that "would not have been in the form prescribed by the Secretary until he returned it with the requested information [*i.e.*, a signature]." Pet. App. 18a. Because Mr. Fleshman failed to return the application within one year with his signature, "the informal claim never became a claim in the form prescribed by the Secretary" and thus did not constitute an "application" under section 5110(b)(1). App. at A-11. On this reasoning, the CVA denied Mr. Fleshman five years of retroactive disability benefits.

THE DECISION OF THE COURT OF APPEALS

Upon denial of his petition for rehearing *en banc* and the entry of judgment on January 14, 1997, Mr. Fleshman timely appealed to the U.S. Court of Appeals for the Federal Circuit. The court of appeals affirmed in a published opinion. Pet. App. 1a.

Like the Court of Veterans Appeals, the Federal Circuit – without even acknowledging "the rule that interpretive doubt is to be resolved in the veteran's favor," *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) – accepted the government's *post hoc* claim that an unsigned application is not "in the form prescribed by the Secretary" within the meaning of 38 U.S.C. § 5101(a) and therefore is not an "application" under section 5110(b)(1). Pet. App. 5a. The court rejected Mr. Fleshman's claim that the statute merely requires applicants to use the proper VA application form (which he concededly did in submitting his 1987 claim) because, in its view, that interpretation was not "compelled" by the text of the statute. *Id.*

Having brushed aside the veteran's interpretation, the court "agree[d] with the government's contention that section 5101(a) requires applicants to submit a claim in a particular format, containing specified information, and signed by the claimant, as called for by the blocks on the application form." *Id.* Although that line of reasoning clearly suggests that "a formal application submitted on the appropriate application form will never be deemed sufficient unless it is letter perfect," *id.*, the court was not willing to follow its reasoning to its logical conclusion. Instead, the court invented an amorphous and unprecedented distinction between "critical elements" and "non-critical elements" of the form, suggesting that an application would not be in the form prescribed by the Secretary only if it lacked a critical element. *Id.*

The court then turned its attention to section 5103(a), which indicates, *inter alia*, that an application is not "incomplete" unless it lacks "evidence." 38 U.S.C. § 5103(a). Responding to Mr. Fleshman's contention that a claim for benefits submitted on the proper application form cannot be dismissed as not "in the form prescribed by the Secretary" under section 5101(a) unless it is "incomplete" within the meaning of section 5103(a), the court offered mere *ipse dixit*: "An application may contain all the necessary 'evidence' bearing on the veteran's claimed disability, but still be missing critical information, so as to prevent the application from being in the form prescribed by the Secretary." Pet. App. 7a. Ultimately, the court deferred to the Secretary on the matter: "By failing to sign the certification and waiver portions of the [application] form, Mr. Fleshman omitted an element

of the application that the Secretary *reasonably regarded* as necessary to enable the agency to process the claim." *Id.* (emphasis added). For these reasons, the court concluded that Mr. Fleshman's 1987 application on the VA-designated application form was not an "application" within the meaning of section 5110(b)(1).

REASONS FOR GRANTING THE PETITION

This is a case in which the non-adversarial process created by Congress, which was meant to *facilitate* recovery by veterans, has broken down. Departing from the usual model of adversarial justice followed in courts and administrative agencies in general, Congress took the veteran within its special protection and care. Thus, it imposed on the Department of Veterans Affairs an affirmative duty to provide, "to the *maximum* extent possible, aid and assistance" to veterans "in the preparation and presentation of claims." 38 U.S.C. § 7722(d) (emphasis added); *see also id.* § 7721(a). This unyielding command from Congress establishes beyond cavil that the VA's role is not to throw up needless obstacles to a meritorious claim by a veteran, as the VA has done in this case, but rather to make every effort to ensure that veterans get the full extent of the benefits to which they may be entitled under the law.

Part and parcel of this veteran-friendly scheme created by Congress is the rule of law that courts and the agency alike *must* resolve any ambiguity in the veterans statutes in favor of the veteran, and against the Government. *See, e.g., Brown* v. *Gardner*, 513 U.S. 115, 118 (1994).

The Federal Circuit below, however, has upset the careful balance struck by Congress in favor of veterans, replacing it with a balance skewed in the Government's favor.

Consistent with prior precedent from that court – which is itself flatly contrary to the rule described in *Brown* v. *Gardner* – the Federal Circuit deferred to the Secretary's *post hoc* rationalization that unsigned but otherwise complete applications for veterans benefits can *never* be considered an "application" sufficient to preserve a veteran's effective date under section 5110(b), rejecting Mr. Fleshman's contrary interpretation for the reason that it was not "compelled" by the statute and because "the Secretary reasonably regarded [a signature] as necessary to enable the agency to process" a claim for benefits. Pet. App. 5a, 7a. In this the panel had matters precisely backwards – under *Brown* v. *Gardner*, it is the Government's interpretation that must be compelled by the statute, *not* the veteran's, and the mere fact that the Government's interpretation may be "reasonabl[e]" is not a sufficient basis for ruling against a veteran. *Id.*

In *Brown* v. *Gardner*, this Court explicitly noted the tension between deferring to the VA (as the Federal Circuit routinely does) and resolving interpretive doubt in favor of veterans. 513 U.S. at 118. Given that the Federal Circuit – the only court other than this one in which the issue can arise – has resolved that question in favor of deference, it is time for this Court to resolve the conflict. The petition for writ of certiorari, accordingly, should be granted.

I. THIS COURT SHOULD RESOLVE A CONFLICT PREVIOUSLY NOTED BY THIS COURT IN ITS DECISIONS ON WHETHER OR NOT *CHEVRON* DEFERENCE APPLIES TO THE SECRETARY OF VETERANS AFFAIRS, A QUESTION THE FEDERAL CIRCUIT HAS RESOLVED AGAINST VETERANS.

This case presents the Court with an opportunity to resolve a conflict in two lines of its cases – a conflict previously noted by this Court – concerning how courts in the judicial review scheme governing veterans cases must respond to statutory ambiguity. One line of cases, stemming from *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), instructs courts to give broad deference to administrative agencies in filling ambiguity or "gaps" in the statutes committed to the agencies' administration by Congress. The other line of cases, typified by cases such as *Brown v. Gardner* and *King* v. *St. Vincent's Hospital*, 502 U.S. 215 (1991), provides the opposite instruction, requiring courts to resolve any ambiguity in the veteran's favor. This Court noted, but had no occasion to resolve, this conflict in *Gardner*, 513 U.S. at 118. This conflict on such a fundamental and important issue to the administration of the veterans benefits laws should be authoritatively resolved by this Court in this case.

In *Chevron*, this Court ruled that, as a general matter, federal courts must defer to administrative agencies' interpretations of the statutes administered by the agencies. The Court held that " '[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or

explicitly, by Congress." 467 U.S. at 843 (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)). As a result, where there is a "gap" in a statute, the agency has the authority to fill that "gap," and "a court may not substitute its own construction . . . for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

To implement this rule of deference, the Court announced a two-step analytical process to be followed "[w]hen a court confronts an agency's construction of the statute which it administers":

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnote omitted). As a result, *Chevron* commands substantial deference to an agency where "the statute is silent or ambiguous with respect to the specific issue." *Id.* at 843.

A very different rule, however, applies in the context of veterans law. In that context, there is an established "canon" of construction providing that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 221 n.9 (1991) (citing *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)).

The Court in *King* added that in light of this canon, it is to be presumed that in enacting laws providing benefits for veterans, Congress intended for the benefit of any doubt as to statutory meaning to be afforded to the veteran. *Id.* In *Brown* v. *Gardner*, this Court again recognized "the rule that interpretive doubt is to be resolved in the veteran's favor." 513 U.S. at 118.

These two rules are flatly inconsistent – and logically incompatible – with each other. *Chevron*'s rule of deference instructs courts to respond to statutory ambiguity by accepting any "permissible" interpretation advanced by the agency. 467 U.S. at 843. The *King/Gardner* rule, however, commands the opposite result – statutory ambiguity must be resolved in favor of the veteran, not the Government. These two standards thus are at war with each other and cannot coexist. Not surprisingly, therefore, this Court has explicitly noted that it is open to question whether the Secretary of Veterans Affairs can lay claim to *Chevron* deference. *See Brown v. Gardner*, 513 U.S. at 117-118 (stating that "[t]he most, then, that the Government could claim on the basis of this term is the existence of an ambiguity to be resolved in [its] favor . . . (*assuming that such a resolution would be possible after applying the rule that interpretive doubt is to be resolved in the veteran's favor*)") (emphasis added) (citing *King*).

Even though *Chevron* deference and the rule that ambiguity must be resolved in favor of veterans are patently inconsistent, as recognized in *Gardner*, the Federal Circuit has squarely ruled, both before and after *Gardner*, that the Secretary is nonetheless entitled to *Chevron* deference. *See, e.g., McCay* v. *Brown*, 106 F.3d 1577, 1579-81 (Fed. Cir. 1997); *Degmetich* v. *Brown*, 104 F.3d 1328, 1329

(Fed. Cir. 1997); *Skinner* v. *Brown*, 27 F.3d 1571, 1575 (Fed. Cir. 1994); *Travelstead* v. *Derwinski*, 978 F.2d 1244, 1250 (Fed. Cir. 1992).

In *Degmetich* v. *Brown*, for example, the court held that in the veterans context, "[w]e review interpretations of statutes . . . applying the two-step test articulated in *Chevron*." *Id.* at 1331 (citation omitted). *Chevron* deference was critical to the court's ruling because it "disagree[d] with both sides' contentions that the meaning of [38 U.S.C.] section 1131 is plain and unambiguous on its face." *Id.* Because the statute was "silent" on the matter before it, *id.*, the court held that the only pertinent question was whether the Secretary's construction "is a rational and permissible way to fill the 'gap' in the interpretation of the statute." *Id.* at 1332 (quoting *Chevron*, 467 U.S. at 842-43). Because, in its view, the Secretary's reading "cannot be considered arbitrary," the court concluded that under *Chevron* "[w]e must therefore accept the Secretary's interpretation." *Id.*; *see also id.* at 1329 ("[W]e hold, under the principles espoused in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, that the Secretary permissibly interpreted 38 U.S.C. § 1131 (1994). . . . ") (citation omitted).

This holding was consistent with the court's prior embraces of *Chevron* deference in spite of the rule that interpretive doubts must be resolved in the veteran's favor. *See, e.g.*, *McCay* v. *Brown*, 106 F.3d at 1579-81 (stating that if Congress " 'has not spoken directly, . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency' ") (quoting *Chevron*, 467 U.S. at 843-44); *Skinner* v. *Brown*, 27 F.3d at 1575 ("an agency's interpretation of a statute deserves deference . . . 'if the

statute is silent or ambiguous with respect to the specific issue' ") (quoting *Chevron*, 467 U.S. at 843); *Travelstead* v. *Derwinski*, 978 F.2d at 1250 (VA's interpretive rules "are of legislative weight and must be given controlling weight by this court unless they are arbitrary, capricious, or manifestly contrary to the statute") (citing *Chevron*, 467 U.S. at 843-44).

In light of this precedent, it comes as no surprise that the court below deferred to the Secretary's interpretation of 38 U.S.C. § 5101(a) in this case. The problem with Mr. Fleshman's interpretation of the statute, in the eyes of the panel, was that it was not "compelled" by the text of the statute. Pet. App. 5a. As such, the court ruled, he could not prevail because "the Secretary *reasonably regarded* [a signature] as necessary to enable the agency to process the claim," Pet. App. 7a – a phrasing that plainly indicates that the court afforded the Secretary *Chevron* deference, in keeping with that court's prior precedent and at odds with "the rule that interpretive doubt is to be resolved in the veteran's favor." *Gardner*, 513 U.S. at 118.

There is no reason to allow the conflict between *Chevron* and *King/Gardner*, which this Court noted in *Gardner* itself, to fester any longer. The Federal Circuit has clearly staked out its position that the Secretary is entitled to *Chevron* deference. Because of the Federal Circuit's "exclusive jurisdiction" over veterans appeals, 38 U.S.C. § 7292(c), there can be no percolation on this matter in other Circuits, and the court of appeals' views on this matter – though plainly erroneous – bind the Nation and its veterans absent this Court's intervention.

This is a particularly important issue in this review scheme. Because the jurisdiction of the Federal Circuit is limited to legal questions, *see id.* § 7292(a), the vast majority of the court's veterans cases, which present cases of statutory interpretation, will be governed by rule of *Chevron*. Thus, not only will the VA be free of *any* federal court review at all on factual findings or the application of law to fact, *id.* – its construction of the law itself will receive only minimal scrutiny. The court of appeals' rejection of the rule that interpretive doubt must be resolved in the veteran's favor is more than just contrary to controlling decisions of this Court; it fundamentally shifts the balance struck by Congress from one favoring the veteran to one favoring the Government. This Court should grant certiorari to restore the original legislative balance and to provide authoritative guidance on this matter of fundamental importance to the proper administration of the veterans benefit statutes.

II. THE COURT OF APPEALS ERRED IN RULING THAT AN UNSIGNED APPLICATION IS NOT AN "APPLICATION" WITHIN THE MEANING OF 38 U.S.C. § 5110.

By improperly deferring to the Secretary's interpretation of the statutes in question, the court of appeals reached a harsh result that Congress could not have intended and that is unjustified in light of the statute. The court deprived a veteran with a valid disability claim a full *five years* of benefits simply because his initial application, which provided all of the evidence or information necessary to process his claim, was not signed. The court of appeals' rather paradoxical view that an unsigned

application is, as a matter of law, never an "application" within the meaning of section 5110 is, to say the least, not compelled by the statute and, in fact, is contrary to the applicable statutes as a whole.

Once a veteran qualifies for disability benefits, it is necessary to determine the effective date of his benefits. That question is governed by 38 U.S.C. § 5110. The statute sets forth a general rule that the effective date "shall not be earlier than the date of receipt of application therefor." *Id.* § 5110(a). That rule is subject to several exceptions, *id.*, including that provided in section 5110(b)(1): "The effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release." It is this latter section that entitles Mr. Fleshman to five years of retroactive benefits, from the date his second application was granted in 1992 back to October 1987, when he was discharged from active duty because he first applied for disability benefits based on his back injury well within one year of his discharge.

Although an unsigned application is obviously an application, the Secretary (on appeal) took a different view. In effect, he argued (and the court of appeals below agreed) that an unsigned application is not "really" an application because Congress provided elsewhere in the veterans statutes that "[a] specific claim in the form prescribed by the Secretary . . . must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary." 38 U.S.C. § 5101(a). That view, however, ignores the fact that section 5101(a), by its terms, merely makes submission of a

"claim" in the proper form a prerequisite to the "pa[yment]" of benefits, *id.*; it says nothing at all about when an "application" is sufficient to preserve a veteran's effective date, a matter dealt with exclusively by section 5110.

On this score, the language of section 5110(g) is critical. In setting forth an exception to the general rule as to a veteran's effective date in the situation when a liberalizing law is passed creating an entitlement to benefits, Congress explicitly made that exception "[s]ubject to the provisions of section 5101 of this title." *Id.* § 5110(g). Importantly, section 5110(b)(1) – the exception that is applicable here – omits this language. Pursuant to the familiar maxim, "Expressio unius est exclusio alterius," the omission of similar language from section 5110(b)(1) reflects congressional intent that the application of section 5110(b)(1), in contrast to section 5110(g), is *not* "[s]ubject to the provisions of section 5101." 38 U.S.C. § 5110(g). *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.") (internal quotation marks omitted); *see also, e.g., Beach* v. *Ocwen Fed. Bank*, 118 S. Ct. 1408, 1413 (1998) (same).

In any event, section 5101, even if applicable, is simply too weak a reed to support the heavy baggage the court placed upon it. As the Court of Veterans Appeals correctly recognized on a number of occasions prior to this case, section 5101(a) merely "require[s] a person claiming VA benefits to file a claim on an application

form provided by the Secretary."[2] *Edenfield* v. *Brown*, 8 Vet. App. 384, 389 (1995); *see generally McTighe* v. *Brown*, 7 Vet. App. 29, 30 (1994) (same) (citing cases).

Indeed, the notion that section 5101(a) was meant to regulate the content of the veteran's responses to the questions on the application form is refuted by 38 U.S.C. § 5103, entitled "Incomplete applications." This statute, as distinct from section 5101(a), plainly addresses the situation where the veteran has not fully completed an application. Significantly, however, Congress (unlike the Secretary and the court below) did not deem mere technical deficiencies to be of sufficient gravity to defeat the completeness of the veteran's application or to warrant short-circuiting the claims adjudication process. To the contrary, a veteran's application cannot be processed only if the veteran has omitted (and failed to provide on request) "evidence" called for on the application. *Id.* § 5103(a). Even accepting the court's view that the veteran's signature is a "critical element" of the application form, Pet. App. 5a, a signature is not, in any sense of the term, "evidence." *See Black's Law Dictionary* 555 (6th ed. 1990) (defining "evidence" as "[a]ll the means by which

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[2] The panel's statement that such an interpretation "would be compelled only if the provision used language such as 'on the form' or 'using the form,' " Pet. App. 5a, misses the point. Those alternative phrasings would have straight-jacketed the Secretary into requiring applicants to use a written form, thereby denying him the flexibility to allow veterans to apply for benefits through other means (*e.g.*, by telephone or, given current technology, over the Internet). By enacting section 5101(a) as it is currently written, Congress preserved administrative flexibility while ensuring that applicants would present their claims to the agency in whatever manner the Secretary might specify.

any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved"). Consequently, in denying Mr. Fleshman an earlier effective date pursuant to section 5110(b)(1), the court of appeals committed legal error.

This is a recurring and significant issue because, unfortunately, it is all too common for veterans to make mistakes in preparing their applications for benefits. Under the rule fashioned out of whole cloth below, veterans now face the risk that any omission, however trivial, might be viewed by the VA bureaucracy after the fact as "critical." Pet. App. 5a. If the decision below is permitted to stand uncorrected, scores of veterans – like Mr. Fleshman – could lose the benefits to which they are entitled under the law, contrary to legislative intent that veterans receive "maximum" assistance in recovering VA benefits. 38 U.S.C. § 7722(d).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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July 7, 1998

APPENDIX

Richard E. **FLESHMAN**, Claimant-Appellant,

v.

Togo D. WEST, Jr., Acting Secretary of Veterans Affairs, Respondent-Appellee.

No. 97-7029.

United States Court of Appeals, Federal Circuit.

March 11, 1998.

Stephen F. Smith, Sidley & Austin, of Washington, D.C., argued for claimant-appellant.

Rodger D. Citron, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, D.C., argued for the respondent-appellee. With him on the brief were Frank W. Hunger, Assistant Attorney General, David M. Cohen, Director, and Joseph A. Kijewski, Assistant Director. Also on the brief were Richard J. Hipolit, Deputy Assistant, General Counsel, and Kerwin E. Miller, Attorney, Department of Veterans Affairs, Washington, D.C.

Before CLEVENGER, Circuit Judge, SMITH, Senior Circuit Judge, and BRYSON, Circuit Judge.

BRYSON, Circuit Judge.

Richard E. Fleshman appeals from the decision of the Court of Veterans Appeals affirming the denial of Mr. Fleshman's request that his claim for disability benefits be assigned an earlier effective date. We agree with the Court of Veterans Appeals that Mr. Fleshman's first application for benefits was not "in the form prescribed by the

Secretary," 38 U.S.C. § 5101(a), and that it therefore did not have the effect of establishing an earlier entitlement date for his receipt of benefits.

I

On May 24, 1986, while on active duty with the United States Army, Mr. Fleshman fell from a repelling tower. As a result of the fall, Mr. Fleshman sustained injuries to his back and right leg, including a compression fracture in the lumbar region of his spine. Following treatment, Mr. Fleshman returned to duty and completed his enlistment. After his honorable discharge on October 8, 1987, Mr. Fleshman sought compensation benefits for his back injury by filing a claim form with the Department of Veterans Affairs regional office in Cleveland, Ohio. Mr. Fleshman, however, did not fill out the second page of the two-page form. He therefore failed to complete the portion of the form calling for (1) his signature, certifying that the statements in the form were accurate and complete, and consenting to have any treating physicians furnish information to the Department of Veterans Affairs; (2) his mailing address; and (3) the date of execution of the form. Upon receiving the incomplete application, the regional office placed check marks next to the boxes where the missing information should have been included. The office then returned the form to Mr. Fleshman, along with a cover letter requesting him to complete the checked items and to return the completed form as soon as possible. The cover letter stated that if the form was not returned within a year of the date of the letter, "benefits, if entitlement is established, may not be paid

prior to the date of its receipt." Mr. Fleshman never returned the form.

On January 30, 1992, Mr. Fleshman submitted a new application seeking compensation benefits for his back injury. Unlike the 1987 application, the 1992 application was signed, dated, and bore a return address. Following a physical examination, the regional office granted Mr. Fleshman's claim effective as of January 30, 1992, the day on which it received his application. Mr. Fleshman appealed the regional office's decision to the Board of Veterans' Appeals, claiming, *inter alia*, that his 1987 application entitled him to an effective date of October 9, 1987, the day after his discharge from service. *See* 38 U.S.C. § 5110(b)(1) ("The effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release.").

The Board of Veterans' Appeals denied Mr. Fleshman's claim for an earlier effective date. The Board made the following factual findings: "The veteran filed an incomplete claims form for disability benefits in October 1987. Upon receipt of the claim, the RO [regional office] returned the claims form to the veteran requesting that additional information be provided prior to further processing of his claim. The form was never returned to the RO, and the veteran's claim was deemed unprocessable. On January 30, 1992, the RO received a completed application. . . . " Citing 38 C.F.R. § 3.158(a), the Board held that "[t]he veteran's failure to return a completed claim form despite the RO's request constituted abandonment of that claim." The Board therefore concluded that Mr.

Fleshman was entitled to benefits only as of January 30, 1992, the date on which the regional office received his completed claim form. *See* 38 U.S.C. § 5110(a) ("Unless specifically provided otherwise in this chapter, the effective date of an award . . . of compensation . . . shall not be earlier than the date of receipt of application therefor.").

Mr. Fleshman appealed the decision of the Board of Veterans' Appeals to the Court of Veterans Appeals. The court affirmed, but it did not base its decision on the "abandonment" ground on which the Board had relied. Instead, the court relied on 38 U.S.C. § 5101(a), which provides that "[a] specific claim in the form prescribed by the Secretary [of Veterans Affairs] must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary." Characterizing Mr. Fleshman's unexecuted 1987 application as an informal claim, *see* 38 C.F.R. § 3.155(a), the court held that "[b]ecause [Mr. Fleshman] failed to comply with the Secretary's requirements within one year from the date of the Secretary's notification, the informal claim never became a claim in the form prescribed by the Secretary." Accordingly, the court concluded that Mr. Fleshman did not submit a claim satisfying the requirements of section 5101(a) until he submitted his 1992 application, and that he was therefore not entitled to an effective date earlier than January 30, 1992.

II

A

In order to receive benefits from the Department of Veterans Affairs, an applicant must file a claim "in the

form prescribed by the Secretary." 38 U.S.C. § 5101(a); *see also* 38 C.F.R. § 3.151(a). Mr. Fleshman contends the statute and regulation merely require a person claiming veterans' benefits to file a claim on an application form provided by the Secretary. We disagree. That result would be compelled only if the provision used language such as "on the form" or "using the form." *Compare* 38 U.S.C. § 5101(a) *and* 38 C.F.R. § 3.151(a) *with* 38 C.F.R. § 3.160(b) (defining an original claim as "[a]n initial formal application *on a form* prescribed by the Secretary") (emphasis added) *and* 38 C.F.R. § 3.153 (stating that "[a]n application *on a form* jointly prescribed by the Secretary and the Secretary of Health, Education, and Welfare" will be considered to be a claim for death benefits) (emphasis added).

We agree with the government's contention that section 5101(a) requires applicants to submit a claim in a particular format, containing specified information, and signed by the claimant, as called for by the blocks on the application form. Our holding does not mean, as Mr. Fleshman suggests, that a formal application submitted on the appropriate form will never be deemed sufficient unless it is letter perfect. However, where the applicant fails to provide critical elements of the information requested on the form and the Department of Veterans Affairs returns the form to the applicant requesting that he provide the missing items, the applicant will not have satisfied the "in the form prescribed by the Secretary" requirement of section 5101(a) until he submits the requested information.

In arguing to the contrary, Mr. Fleshman relies on the Court of Veterans Appeals' decision in *Edenfield v. Brown*,

8 Vet.App. 384, 389 (1995), which states that section 5101 "require[s] a person claiming VA benefits to file a claim on an application form provided by the Secretary." That statement indicates that using the prescribed application form is a necessary condition for compliance with section 5101(a), but it does not stand for the proposition that filling out the prescribed application form is the *only* requirement section 5101(a) imposes on applicants.

Mr. Fleshman notes that 38 U.S.C. § 5101(c) directs the Secretary to deny an application for benefits if the Secretary requests the applicant to furnish his social security number and the applicant fails to do so. Because there is no analogous provision with respect to the information Mr. Fleshman failed to provide, Mr. Fleshman argues that it is improper for the agency to deny an application on the ground that it is missing that information. That argument is unpersuasive, because it suggests that an application containing nothing but the claimant's social security number would be adequate to satisfy section 5101(a), as long as the application was submitted on the correct form. Such an "application" could not reasonably be considered to be "in the form prescribed by the Secretary," as section 5101(a) requires.

Finally, Mr. Fleshman contends that even if section 5101(a) requires more than the filing of a claim on an application form provided by the Secretary, the Court of Veterans Appeals erred in ruling that his 1987 application was not in the proper form simply because it was missing his signature, his address, and the date on which he executed the application. Mr. Fleshman argues that his application contained all the "evidence" material to his claim and that it was therefore not "incomplete" within

the meaning of 38 U.S.C. § 5103(a), which states that an application is "incomplete" if it lacks the "evidence necessary to complete the application." Mr. Fleshman concludes that because his application was not "incomplete," it must be deemed to be in the prescribed form within the meaning of section 5101(a).

We reject that reasoning. An application may contain all the necessary "evidence" bearing on the veteran's claimed disability, but still be missing critical information, so as to prevent the application from being in the form prescribed by the Secretary. In order to determine whether a particular item called for by the form is critical, it is necessary to assess the role of the missing item in the application process. The applicant's signature is a critical element of the form because it is the manner by which the applicant (1) certifies that the statements made in the application are true and complete, (2) consents to allow any treating physician or hospital to furnish information about the applicant to the Department of Veterans Affairs, and (3) waives any privilege that would render such information confidential. By failing to sign the certification and waiver portions of the form, Mr. Fleshman omitted an element of the application that the Secretary reasonably regarded as necessary to enable the agency to process the claim. Thus, we agree with the CVA that the omissions in Mr. Fleshman's 1987 application prevented that application from being "in the form prescribed by the Secretary," as required by 38 U.S.C. § 5101(a).

Because Mr. Fleshman's original claim form lacked a critical component, the Court of Veterans Appeals was correct in characterizing his application as an informal claim, *see* 38 C.F.R. § 3.155(a), and in concluding that

because Mr. Fleshman failed to return the completed form within one year, his informal claim never became a valid claim in the form prescribed by the Secretary. *See id;* 38 U.S.C. § 5103(a). Consequently, we uphold the court's determination that Mr. Fleshman is not entitled to an effective date earlier than January 30, 1992, the date on which he submitted his formal claim.

B

Aside from the merits of the section 5101(a) argument, Mr. Fleshman contends that the Court of Veterans Appeals' decision must be reversed because it violates the *Chenery* doctrine, which generally bars a court from upholding an agency decision on a ground other than the one relied on by the agency. *See Securities & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *Securities & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."); *NEC Home Elecs., Ltd. v. United States*, 54 F.3d 736, 743 (Fed.Cir.1995) ("We are powerless to affirm an administrative action on a ground not relied upon by the agency."). Mr. Fleshman argues that both the Court of Veterans Appeals and this court are

restricted to reviewing the propriety of the decision of the Board of Veterans' Appeals based solely on the "abandonment" ground upon which the Board relied, and that neither court may affirm the Board's decision on the ground that Mr. Fleshman failed to satisfy section 5101(a).

As this court and others have noted, the *Chenery* doctrine is not applied inflexibly. *See, e.g., Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1099-1102 (Fed.Cir.1996); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1439-40 (8th Cir.1993); *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir.1982); *Chae-Sik Lee v. Kennedy*, 294 F.2d 231, 233-34 (D.C.Cir.1961). In particular, the doctrine does not prohibit a reviewing court from affirming an agency decision on a ground different from the one used by the agency if the new ground is not one that calls for "a determination or judgment which an administrative agency alone is authorized to make." *Koyo Seiko*, 95 F.3d at 1101. In addition, the doctrine does not require a remand to the agency if it is clear that "the agency would have reached the same ultimate result" had it considered the new ground. *Ward v. Merit Sys. Protection Bd.*, 981 F.2d 521, 528 (Fed.Cir.1992).

In this case, the Board's conclusion that Mr. Fleshman abandoned his claim included the explicit findings that his original claim form was "incomplete" and that he "did not file a completed claim" until his second application in 1992. The Board's finding that Mr. Fleshman did not file a completed claim form in 1987 sufficient to establish his right to benefits provides the complete factual predicate for the legal conclusion that he failed to file "a specific claim in the form prescribed by the Secretary." 38 U.S.C. § 5101(a); 38 C.F.R. § 3.151(a).

While the Court of Veterans Appeals analyzed the defect in Mr. Fleshman's original claim under a different legal rubric, the Board's underlying findings demonstrate that the agency had already exercised its discretion in determining what information is required for an application to be in the proper form. In *Chenery*, by contrast, the agency had "formulated no judgment upon the requirements of the [relevant statutory provision]." *Chenery Corp.*, 318 U.S. at 92, 63 S.Ct. at 461. For that reason, it seems clear to us that the agency would have reached the same conclusion if it had addressed the legal issue on which the Court of Veterans Appeals rested its judgment. We therefore disagree with Mr. Fleshman that the case must be remanded to allow the Board of Veterans' Appeals to rule on the section 5101(a) issue in the first instance.

III

Mr. Fleshman raises two other challenges to the decision of the Court of Veterans Appeals, neither of which we find meritorious. First, he contends that the cover letter from the regional office, which stated that "benefits, if entitlement is established, may not be paid prior to the date of . . . receipt [of the missing information]" denied him due process, because it misleadingly suggested that he could receive benefits even if he did not respond to the agency's request. We disagree. The letter clearly identified the missing items that Mr. Fleshman was required to submit, and it accurately advised him that if he did not respond within the one year deadline he was unlikely to receive any benefits until he submitted a completed application. That notice was adequate to satisfy the

agency's obligations under the Due Process Clause. *See Morris v. Derwinski*, 1 Vet.App. 260, 265 (1991).

Second, Mr. Fleshman argues that the Court of Veterans Appeals' decision must be reversed because the Department of Veterans Affairs violated the Paperwork Reduction Act, 44 U.S.C. § 3512(a). In particular, he argues that the cover letter from the regional office constituted a "collection of information" within the meaning of 44 U.S.C. § 3502(3). Because the letter did not "display a valid control number assigned by the Director [of the Office of Management and Budget]," he argues that it was improper for the Department of Veterans Affairs to subject him "to any penalty for failing to comply" with its request. 44 U.S.C. § 3512(a). The short answer to that argument is that the regional office's letter did not constitute a "collection of information," as it did not "call[ ] for . . . answers to . . . questions." 44 U.S.C. § 3502(3)(A). It was the application enclosed with the letter that contained the "questions posed." *Id.* Because the application displayed a valid control number from the Office of Management and Budget, the request for information was in full compliance with the Paperwork Reduction Act.

AFFIRMED.

97-7029

UNITED STATES COURT OF VETERAN APPEALS

No. 94-902

RICHARD E. FLESHMAN, APPELLANT,

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided Nov. 22, 1996)

Stephen F. Smith, was on the brief for the appellant.

Mary Lou Keener, General Counsel; *Ron Garvin*, Assistant General Counsel; *R. Randall Campbell*, Deputy Assistant General Counsel; and *Peter M. Donawick*, were on the brief for appellee.

Before KRAMER, FARLEY, and IVERS, *Judges*.

IVERS, *Judge*, filed the opinion of the Court. KRAMER, *Judge*, filed a concurring opinion.

IVERS, Judge:

The appellant appeals from a June 23, 1994, Board of Veterans' Appeals (BVA or Board) decision which denied a rating greater than 20% and an earlier effective date for residuals of a fracture to the lumbar spine. The Court sua sponte vacates its September 30, 1996, opinion, and issues this opinion in its stead. For the reasons stated below the Court will affirm in part and vacate and remand in part.

I. Facts

The appellant served on active duty in the U.S. Army from October 1984 to October 1987. Record (R.) at 15. On May 24, 1986, the appellant fell approximately 20 feet, landed on his buttocks and lower back, and sustained a compression fracture in the lumbar region of the spine at L-3 and a fracture of the right distal fibula. R. at 29-49, 66-93. The lumbar portion of the back is located between the chest and the pelvis. Dorland's Illustrated Medical Dictionary 961, 1705 (28th ed. 1994) [hereinafter Dorland's]. The fibula is the outer and smaller of the two bones of the lower leg. *Id.* at 629.

In October 1987 the appellant submitted his claim for compensation for his back injury. R. at 51-52. The appellant did not date, sign, or give his mailing address on the claim form. R. at 52. In November 1987 VA sent the appellant a form letter requesting further information. The letter included an "X" next to the following paragraphs:

> 1. The evidence requested below should be submitted as soon as possible, preferably within 60 days, and in any case it must be received in the VA within one year from the date of this letter; otherwise benefits, if established, may not be paid prior to the date of its receipt.
>
> . . . .
>
> b. Please complete all items checked in red on the enclosed form(s) and return it to this office.

R. at 54. Checkmarks were placed next to the boxes for the date, the claimant's signature, and the claimant's mailing address on the claim form.

R. at 56. The form was never returned to VA.

In January 1992 the appellant submitted an application for compensation or pension for "L3 fracture, compressed vertebra – 50% [and] fracture of the right leg with adjunct left knee complications – 1986." Supplemental (Suppl.) R. at 2-5. This application contained the appellant's signature, mailing address, and the date. R. at 2, 5.

In March 1992 the appellant underwent a physical examination administered by Lee R. Weiss, M.D. R. at 96-103. The examination revealed that there was tenderness at the waistline at or around L-3. "There is some limitation and range of motion to the lumbar spine on flexion forward, he flexes to approximately 75-80 degrees. On extension backward to 30 degrees, lateral flexion 40 degrees, rotation 35 degrees." R. at 96. The impression was (1) low back pain, status post compression fracture of L-3, with no evidence of radiculopathy or neurologic compromise; (2) status post fracture of the right fibula; and (3) left knee pain, unknown etiology. R. at 97. Radiculopathy is a disease of the nerve roots. DORLAND'S at 1404. Dr. Weiss reported that there was no swelling or deformity to the back, the right ankle, or the left knee. R. at 98. He also determined that no postural abnormalities nor fixed deformities were noted, that the musculature of the back was normal, and that the appellant's cranial nerves, motor, deep tendon reflexes, sensory examination, plantar reflex, gait, and cerebellar examination were all normal. R. at 100.

In a June 24, 1992, rating decision, the regional office (RO) granted service connection for the appellant's lumbar spine injury with compression fracture at L-3, rated 20% disabling, and for his right fibula fracture, rated 0% disabling, both effective January 30, 1992, for a combined

disability rating of 20%. R. at 109. Service connection for a left knee condition was denied. *Ibid.*

The appellant filed a Notice of Disagreement in July 1992 and a Statement of the Case was issued. R. at 114, 117-20. The appellant filed a VA Form 1-9, Appeal to the Board of Veterans' Appeals. R. at 127-28. In June 1993 the appellant submitted a statement which revealed that he was medically unsuitable for a mail processor position with the U.S. Postal Service because of his back condition. R. at 144-45. Several congressional inquiries were also received by VA. R. at 150-61, 163-69.

On June 23, 1994, the BVA rendered the decision currently on appeal. R. at 3-10. The Board found in relevant part: (1) that the appellant had a history of chronic lumbar spine pain, with limitation of motion, which was not currently shown to be more than slightly debilitating; (2) that neither an exceptional nor unusual disability picture was presented to render impractical the application of the regular schedular standards; (3) that the appellant filed an incomplete claim form for disability benefits in October 1987, which was returned with a request for additional information so that his claim could be processed, and that because the form was never returned to the RO, the appellant's claim could not be processed; and (4) that on January 30, 1992, the RO received a completed application for service connection for disabilities of the back and lower extremities. R. at 5. The BVA concluded that the criteria for an evaluation greater than 20% for the residuals of a fracture to the lumbar spine with a compression fracture at L-3 had not been met. The Board also determined that the criteria for an earlier effective date

for a 20% schedular rating for the residuals of a compression fracture to the lumbar spine at L-3 had not been met. *Ibid.*

II. Analysis

A.

The appellant argues that he is entitled to an effective date of October 1987 for his back injury, the date he initially submitted an application for compensation. "[T]he effective date of an award based on an original claim . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a). If the original claim is received within one year from the date of release or discharge from active service, the effective date for an award of disability compensation will be the day following the date of discharge or release from active service. 38 U.S.C. § 5110(b); 38 C.F.R. § 3.400(b) (1995). The effective date is the date of receipt of the claim or the date the entitlement arose, whichever is later. *Gonzales-Soto v. Principi*, 3 Vet.App. 330, 332 (1992) *recons. den.*, 3 Vet.App. 527 (1992); *Godfrey v. Derwinski*, 2 Vet.App. 352, 356 (1992); 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(b)(2). The Court reviews the issue of an earlier effective date under the "clearly erroneous" standard of review. *Hanson v. Brown*, 9 Vet.App. 29, 32 (1996); *Scott v. Brown*, 7 Vet.App. 184 (1994); *Quarles v. Derwinski*, 3 Vet.App. 129 (1992); *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990). "[I]f there is a 'plausible' basis in the record for the factual determinations of the BVA, even if this Court might not have reached the same factual determinations, [the Court] cannot overturn them." *Gilbert*, 1 Vet.App. at 53.

Pursuant to 38 U.S.C. § 5101(a), "A specific claim in the form prescribed by the Secretary . . . must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary." *See also* 38 C.F.R. § 3.151(a) (1995).

> Any communication or action, indicating an intent to apply for one or more benefits under the laws administered by the Department of Veterans Affairs, from a claimant . . . may be considered an informal claim. **Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant *for execution*.** If received within 1 year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim.

38 C.F.R. § 3.155(a) (1995) (emphasis added). The execution requirement is significant. The specific language preceding the signature line on the application states:

> **I CERTIFY** that the foregoing statements are true and complete to the best of my knowledge and belief. I consent that any physician, surgeon, dentist or hospital that has treated me or examined me for any purpose or that I have consulted professionally, may furnish to the Veterans Administration any information concerning myself and I waive any privilege which renders such information confidential.

R. at 56. The requisite certification is an essential element of the form prescribed by the Secretary and affords evidentiary significance to the statements contained on the application and serves as a release to allow VA to obtain the appellant's medical records.

As noted above, benefits, by statute and regulation, can be paid only if the claimant files the specific form prescribed by the Secretary. 38 U.S.C. § 5101(a); 38 C.F.R. § 3.151(a).

> Under 38 U.S.C. § 5103(a), the Secretary is obligated to notify a claimant if an application for benefits is not complete. If the claimant fails to submit the evidence necessary to complete the application within one year of such notification, the Secretary is then, but only then, permitted to refrain from awarding benefits.

Isenhart v. Derwinski, 3 Vet.App. 177, 179 (1992).

The appellant's unexecuted claim form was an informal claim and would not have been in the form prescribed by the Secretary until he returned it with the requested information. *See* 38 C.F.R. § 3.155(a); *Kluttz v. Brown*, 7 Vet.App. 304, 306-07 (1994). The appellant was adequately notified regarding what information was needed to complete the application form when the form was returned to him. The appellant was required only to return the form within one year of the request with his signature, mailing address, and the date in order to begin the claims process. Had the appellant completed the form, his application would have been deemed a formal claim filed in October 1987. By returning the form and enclosing the letter, which clearly dictated what was necessary for his application to be complete for VA purposes, VA complied with the applicable statute and regulation. The Court notes that the appellant has never stated that he did not receive the notification letter from VA. Because the appellant failed to comply with the Secretary's

requirements within one year from the date of the Secretary's notification, the informal claim never became a claim in the form prescribed by the Secretary. To the extent that the BVA's analysis is inconsistent with this decision, it is nonprejudicial error. *See* 38 U.S.C. § 7261(b); *Kehoskie v. Derwinski*, 2 Vet.App. 31, 34 (1991). For these reasons, the appellant is not entitled to an effective date earlier than January 30, 1992, the date he submitted his formal claim, and the Court will affirm the Board's decision regarding this issue. *See* 38 U.S.C. § 5110(a).

B.

The Court reviews the Board's findings of fact under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Booton v. Brown*, 8 Vet.App. 368, 372 (1995); *Cox v. Brown*, 6 Vet.App. 459, 460 (1994); *Butts v. Brown*, 5 Vet.App. 532, 535 (1993) (en banc). The finding as to the degree of impairment resulting from a disability is a question of fact. *See Francisco v. Brown*, 7 Vet.App. 55, 57 (1994); *Solomon v. Brown*, 6 Vet.App. 396, 402 (1994). "[U]nder the 'clearly erroneous' rule this Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a 'plausible' basis in the record for the factual determinations of the BVA, . . . we cannot overturn them." *Gilbert*, 1 Vet.App. at 53.

Upon submission of a well-grounded claim, as this is, the burden is on the Secretary to assist the veteran in developing "*all* relevant facts, not just those for or against the claim," *Ivey v. Derwinski*, 2 Vet.App. 320, 322 (1992), and "to seek *medical evidence* either to verify or not verify

the claim." *Obert v. Brown*, 5 Vet.App. 30, 33 (1993) (emphasis in original); *see also Solomon*, 6 Vet.App. at 401; *Talley v. Brown*, 6 Vet.App. 72, 74 (1993). The duty to assist may include the duty to seek pertinent private medical records. *Allday v. Brown*, 7 Vet.App. 517, 526 (1995); *Masors v. Derwinski*, 2 Vet.App. 181, 186-87 (1992).

In this case, there is information in the record sufficient to put the Secretary on notice of the existence of competent medical evidence that would, if true, be relevant and necessary for a full and fair adjudication of the claim. *Robinette v. Brown*, 8 Vet.App. 69, 77 (1995). Specifically, a letter to the appellant from the U.S. Postal Service stated, "You have been found medically unsuitable for a position of Mail Processor. A review of your medical records and evaluation by Gary Whitacre, M.D. revealed a history of back pain." R. at 144. It does not appear from the record that the Secretary requested these records and therefore, because the statutory duty to assist was not fulfilled, a remand is required.

C.

The Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record, including its denial of any assistance specifically sought by the claimant. 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527. The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review by this Court. *Allday, supra; Simon v. Derwinski*, 2 Vet.App. 621,

622 (1992); *Gilbert*, 1 Vet.App. at 57. To meet this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence which it finds to be persuasive and unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the veteran. *Shipwash v. Brown*, 8 Vet.App. 218, 223 (1995); *Allday, supra*.

The appellant argues that an extraschedular evaluation was required. In this case, the BVA addressed this issue as follows:

> Consideration has also been given to the potential application of the extraschedular evaluation provisions of 38 C.F.R. § 3.321(b) (1993). The evidence does not present such an exceptional or unusual disability picture as to render impractical the application of the regular schedular standards. Specifically, there has not been a demonstration of marked interference with employment or frequent periods of hospitalization so as to render impractical the application of the regular schedular criteria.

R. at 7. The Board has not offered anything in support of its statement which would identify those findings which it finds important to its decision, nor does it account for the evidence which it finds persuasive or unpersuasive. The Board has simply provided a "bare conclusory statement, without . . . supporting analysis and explanation." *Watson v. Brown*, 4 Vet.App. 309, 315 (1993) (citing *Gilbert, supra*). In addition, by failing to obtain the postal medical records and Dr. Whitacre's records, the Board could not and did not discuss Dr. Whitacre's opinion, the reasons the appellant was found to be unacceptable for

employment with the U.S. Postal Service, and their relevancy, if any, to the claim for an extra-schedular rating. Therefore, the Court finds the Board's statement of the reasons or bases for its June 23, 1994, BVA decision inadequate under 38 U.S.C. § 7104(d)(1). *See Bagwell v. Brown*, 9 Vet.App. ___, No-95-238 (July 3, 1996).

III. Conclusion

For the reasons stated above, the BVA's June 23, 1994, decision is **AFFIRMED** in part and **VACATED** and **REMANDED** in part.

KRAMER, *Judge*, concurring: The appellant's unexecuted claim cannot provide the basis for an earlier effective date on at least one, and perhaps two, other bases. First, because the appellant never returned the application form forwarded to him for execution, he is not entitled under 38 C.F.R. § 3.155(a) (1995) to the filing date of the unexecuted claim. Second, assuming that because a claim is unexecuted it is missing requisite evidence, the appellant's claim was incomplete under 38 U.S.C. § 5103(a) and *Isenhart v. Derwinski*, 3 Vet.App. 177 (1992). Because the appellant was notified of such missing evidence, his failure to provide it within one year precludes the award of an earlier effective date. Third, again assuming that because a claim is unexecuted it is missing requisite evidence, the appellant's failure to provide the missing evidence within one year after being requested to do so resulted in an abandoned claim under 38 C.F.R. § 3.158(a) (1995), a circumstance which cannot give rise to an earlier effective date.

IN THE APPEAL OF CSS 279 74 8795
RICHARD E. FLESHMAN

(SEAL)

BOARD OF VETERANS' APPEALS
WASHINGTON, D.C. 20420

DOCKET NO. 92-22-247) DATE JUN 23 1994

THE ISSUES

1. Entitlement to an increased rating for the residuals of a fracture to the lumber spine with a compression fracture at L-3, currently evaluated as 20 percent disabling.

2. Entitlement to an effective date earlier than January 30, 1992, for the granting of a 20 percent evaluation for the residuals of a fracture to the lumbar spine with a compression fracture at L-3.

REPRESENTATION

Appellant represented by: Disabled American Veterans

ATTORNEY FOR THE BOARD

Patrick J. Costello, Associate Counsel

INTRODUCTION

The veteran had active military service from October 1984 to October 1987.

This matter came before the Board of Veterans' Appeals (hereinafter the Board) on appeal from a June 1992 rating

decision of the Department of Veterans Affairs (VA) Regional Office (RO), in Columbus, Ohio.

CONTENTIONS OF APPELLANT ON APPEAL

While in service, the veteran fell off a repelling tower, injuring his back and right leg. After being casted, and wearing a brace, the veteran resumed his duties in the Army until being honorably discharged in 1987. While in college, he discovered that he was possibly eligible for disability compensation. He applied for benefits in January 1992, and received a 20 percent evaluation for his lower back disorder.

The veteran now contends that the RO erred when it failed to rate his back disorder more debilitating. He claims that he is in constant pain and distress, and that he is severely limited in the types of activities he may professionally and socially participate in. Additionally, he avers that the RO erred when it refused to grant an effective date earlier than January 30, 1992, for a 20 percent evaluation for his service-connected disability. He alleges that the proper effective date should be October 9, 1987, the day after he completed his military service.

DECISION OF THE BOARD

The Board, in accordance with the provisions of 38 U.S.C.A. § 7104 (West 1991), has reviewed and considered all of the evidence and material of record in the veteran's claims file. Based on its review of the relevant evidence in this matter, and for the following reasons and bases, it is the decision of the Board that the preponderance of the

evidence is against the claim for an evaluation in excess of 20 percent for the residuals of a fracture to the lumbar spine with a compression fracture at L-3.

It is also the decision of the Board that the preponderance of the evidence is against the granting of an effective date earlier than January 30, 1992, for a 20 percent rating for the residuals of a fracture to the lumbar spine with a compression fracture at L-3.

FINDINGS OF FACT

1. All relevant evidence necessary for an equitable disposition of the veteran's appeal has been obtained by the agency of original jurisdiction.

2. The veteran has a history of chronic lumbar spine pain, with limitation of motion, which is not currently shown to be more than slightly debilitating.

3. Neither an exceptional nor unusual disability picture has been presented so as to render impractical the application of the regular schedule standards.

4. The veteran filed an incomplete claims form for disability benefits in October 1987. Upon receipt of the claim, the RO returned the claims form to the veteran requesting that additional information be provided prior to further processing of his claim. The form was never returned to the RO, and the veteran's claim was deemed nonprocessable.

5. On January 30, 1992, the RO received a completed application for service connection for disabilities of the back and lower extremities.

CONCLUSIONS OF LAW

1. The criteria for an evaluation in excess of 20 percent for the residuals of a fracture to the lumbar spine with a compression fracture at L-3 have not been met. 38 U.S.C.A. §§ 1155, 5107(a) (West 1991); 38 C.F.R. §§ 3.321(b)(1), 4.1, 4.2, 4.7, 4.10, Part 4, Diagnostic Codes 5285 and 5295 (1993).

2. The criteria for an effective date earlier than January 30, 1992, for a 20 percent schedular rating for the residuals of a fracture to the lumbar spine with a compression fracture at L-3 have not been met. 38 U.S.C.A. §§ 5107, 5110 (West 1991); 38 C.F.R. §§ 3.1(p), 3.158(a), 3.400 (1993).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

In accordance with 38 U.S.C.A. § 5107 (West 1991), and *Murphy v. Derwinski*, 1 Vet. App. 78 (1990), the appellant has presented a well-grounded claim. The facts relevant to this appeal have been properly developed and the obligation of the Department of Veterans Affairs (VA) to assist the veteran in the development of his claim has been satisfied. *Id.*

I. Increased Rating for a Lower Back Disorder

Disability evaluations are based upon the average impairment of earning capacity as determined by a schedule for rating disabilities. 38 U.S.C.A. § 1155 (West 1991); 38 C.F.R. Part 4 (1993). Separate rating codes identify the

various disabilities 38. C.F.R. Part 4 (1993). In determining the current level of impairment, the disability must be considered in the context of the whole recorded history, including service medical records. 38 C.F.R. §§ 4.2, 4.41 (1993). An evaluation of the level of disability present also includes consideration of the functional impairment of the veteran's ability to engage in ordinary activities, including employment, and the effect of pain on the functional abilities. 38 C.F.R. §§ 4.10, 4.40, 4.45, and 4.59 (1993).

In June 1992, the veteran was rated 20 percent disabled for the residuals of a fracture to the lumbar spine with a compression fracture at L-3. In assigning the 20 percent rating, the RO determined that the disability warranted a 10 percent evaluation for the limitation of motion caused by the condition, with an additional 10 percent added for the deformity of the third lumbar vertebral body. The disability was thus rated under Diagnostic Codes 5285 and 5295, of 38 C.F.R. Part 4 (1993). Residuals of a fracture of a vertebra warrant a 60 percent evaluation if there is no spinal cord involvement, but abnormal mobility is present that requires a neck brace (jury mast). In other such cases, the residuals should be rated on the basis of resulting definite limitation of motion or muscle spasm, adding 10 percent for demonstrable deformity of a vertebral body. When evaluating the residuals on the basis of ankylosis and/or limited motion, evaluations should not be assigned for more than one spinal segment by reason of the involvement of only the first or last vertebra of an adjacent segment. 38 C.F.R. Part 4, Diagnostic Code 5285 (1993).

A noncompensable evaluation is warranted for lumbosacral strain where there are only slight subjective symptoms. A 10 percent evaluation is warranted for lumbosacral strain where there is characteristic pain on motion. A 20 percent evaluation requires muscle spasm on extreme forward bending and unilateral loss of lateral spine motion in a standing position. A 40 percent evaluation requires severe lumbosacral strain manifested by listing of the whole spine to the opposite side, a positive Goldthwait's sign, marked limitation of forward bending in a standing position, loss of lateral motion with osteoarthritic changes, or narrowing or irregularity of the joint space. A 40 percent evaluation is also warranted if only some of these manifestations are present if there is also abnormal mobility on forced motion. 38 C.F.R. Part 4, Diagnostic Code 5295 (1993).

Since the initial rating decision, no other evidence has been presented in support of the veteran's claim and we must rely upon the record presented before us. On March 16, 1992, the veteran underwent general and orthopaedic examinations at the Knox Community Hospital. Those examinations results were as follows:

> PHYSICAL EXAMINATION:
>
> . . . carriage, posture and gait are normal . . . Musculoskeletal system; There is some tenderness at the waistline at or around L-3. There is no deformity. No step-off and no crepitus. There is some limitation and range of motion to the lumbar spine on flexion forward, he flexes to approximately 75-80 degrees. On extension backward to 30 degrees, lateral flexion 40 degrees, rotation 35 degrees . . . neurological

examination; Cranial nerves, motor, deep tendon reflexes, cerebellar, mental status, sensory examination, plantar reflexes, gait; all entirely normal . . .

IMPRESSION:

1. Low back pain, status post compression fracture of L-3. No evidence of radiculopathy or neurologic compromise.

Acute distress has not been diagnosed, and there is minimal limitation in the range of motion. Moderate or severe limitation of motion of the spine has not been diagnosed. No soft tissue swelling is present, and the veteran is not required to wear an appliance as a result of the fracture of L-3. Because symptomatology indicating a higher evaluation is not present, an increased rating for the residuals of a fracture to the lumbar spine with a compression fracture at L-3 is not warranted. 38 U.S.C.A. §§ 1155, 5107 (West 1991); 38 C.F.R. §§ 3.321(b), 4.1, 4.2, 4.10, Part 4, Diagnostic Codes 5285 and 5295 (1993).

Consideration has also been given to the potential application of the extraschedular evaluation provisions of 38 C.F.R. § 3.321(b) (1993). The evidence does not present such an exceptional or unusual disability picture as to render impractical the application of the regular schedular standards. Specifically, there has not been a demonstration of marked interference with employment or frequent periods of hospitalization so as to render impractical the application of the regular schedular criteria.

II. Earlier Effective Date

The veteran had active duty from October 1984 through October 1987. During his enlistment, the veteran suffered from and was treated for a lower back disability. He was discharged October 8, 1987. In October 1987, the Cleveland RO received VA Form 21-526e, Veteran's Application for Compensation or Pension at Separation from Service, in which the veteran requested service connection for an "injured back." However, the veteran did not complete the form, and it was returned to him in November 1987. VA FL 21-96, November 24, 1987. The form was sent to 6472 Middleshire, Columbus, Ohio 43229; the veteran's home of record address as noted on his DD Form 214, Item 19.

Along with the incomplete form, the RO forwarded instructions to the veteran requesting that he complete the form and return it to the RO. If those instructions were not complied with within one year, the RO informed the veteran that his claim would be deemed extinguished and further processing would cease. The veteran never returned the form, and no further processing was accomplished in regard to his abandoned claim.

Four years later, on January 10, 1992, the veteran reapplied for benefits for his back and lower extremities at the Columbus RO. VA Form 21-526, Veteran's Application for Compensation or Pension. The form was received at the RO on January 30, 1992. The RO issued a Rating Decision, dated June 24, 1992, which established service connection for the residuals of a fracture of the right fibula, and for the residuals of a fracture to the lumbar spine with a

compression fracture at L-3. The effective date was January 30, 1992, the day the claim was received at the RO. Since the issuance of that rating decision, the veteran has appealed the effective date of the decision claiming that his effective date should be October 9, 1987, the day after the date of his discharge from service.

While the Board is sympathetic to the veteran's claim, it is this panel's determination that an earlier effective date is not warranted. The governing statutory and regulatory provisions expressly stipulate that the effective date for the granting of disability compensation is the day following separation from active service *or* the date that the entitlement arose if the claim is received one year after separation from service. When a claim is received *more than one year after the date of service separation,* the *effective date* for the granting of disability benefits is the *later of the dates that the claim was received or that entitlement arose.* 38 U.S.C.A. § 5110 (West 1991); 38 C.F.R. § 3.400 (1993) (emphasis supplied). Moreover, if a claim is considered abandoned, i.e., the veteran has not provided requested information within a one year period and no further action has commenced on the claim, and the veteran then submits what is essentially a new claim, the right to benefits, when established, shall commence no earlier than the date of filing the new claim. 38 C.F.R. § 3.158(a) (1993). Here the veteran did not file a completed claim for his back and leg disabilities until he had been out of the service for over four years. While the service medical evidence received after the veteran's claim for benefits show the incidence of an injury while in service, the date that the application was received is later than the dates of the records indicating entitlement to benefits. Because the

statutory and regulatory provisions require that the effective date in such circumstances be the later date, the January 30, 1992, effective date is correct.

It may be suggested with respect to the veteran's initial incomplete claim for benefits in October 1987 that the RO had the duty to complete processing of the claim regardless of the incomplete form. The duty to assist is not a one-way street. If the veteran wishes help or assistance from the VA, he cannot wait passively for it. *See Wood v. Derwinski*, 1 Vet.App. 190 (1993); *Gobber v. Derwinski*, 2 Vet.App. 470 (1992). The veteran's failure to return a completed claim form despite the RO's request constituted abandonment of that claim and, as such, did not give rise to any further duty to assist.

It must be therefore concluded that January 30, 1992, is the appropriate effective date for the granting of service connection for a lower back disorder, and that an effective date earlier than January 30, 1992, is not warranted. 38 U.S.C.A. § 5110 (West 1991); 38 C.F.R. §§ 3.1(p), 3.158(a), 3.400 (1993).

ORDER

1. An evaluation in excess of 20 percent for the residuals of a fracture to the lumbar spine with a compression fracture at L-3 is denied.

2. An effective date earlier than January 30, 1992, for the granting of service connection for the residuals of a fracture to the lumbar spine with a compression fracture at L-3 is denied.

(SEAL)

BOARD OF VETERANS' APPEALS
WASHINGTON, D.C. 20420

/s/ W. H. Yeager, Jr., M.D.
W. H. YEAGER, JR., M.D.

/s/ Bettina S. Callaway
BETTINA S. CALLOWAY

/s/ Jack W. Blasingame
JACK W. BLASINGAME

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C.A. § 7266 (West 1991), a decision of the Board of Veterans' Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision, provided that a Notice of Disagreement concerning an issue which was before the Board was filed with the agency of original jurisdiction on or after November 18, 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402 (1988). The date which appears on the face of this decision constitutes the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans' Appeals.

(2)

FILED
AUG 17 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-88

In The

Supreme Court of the United States

October Term, 1997

RICHARD E. FLESHMAN,

Petitioner,

v.

TOGO D. WEST, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF OF AMICUS CURIAE THE NATIONAL ORGANIZATION OF VETERANS' ADVOCATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congressional intent, as demonstrated by the statutory scheme regarding the administration of veterans' benefits, supports the interpretive rule recognized by this Court in *Brown v. Gardner*, 513 U.S. 115 (1994), that any ambiguity in the veterans statutes must be resolved in favor of the veteran, and points to error in the Federal Circuit's ruling that interpretation of veterans statutes by the Secretary of Veterans Affairs is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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OPINIONS BELOW[1]

The opinion of the Court of Appeals is reported at 138 F.3d 1429 and is reproduced in the Appendix of the Petition for a Writ of Certiorari (Pet.App.) beginning at page 1a. The opinion of the Court of Veterans Appeals is reported at 9 Vet.App. 548 and is reprinted at Pet.App. 12a-22a. The opinion of the Board of Veterans' Appeals is unreported and is reprinted at Pet.App. 23a-33a.

STATUTES AND REGULATIONS INVOLVED

38 U.S.C. § 1111. Presumption of sound condition.

> For the purposes of section 1110 of this title, every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.

38 U.S.C. § 1112. Presumptions relating to certain diseases and disabilities.

---

[1] Pursuant to Rule 37.6, counsel for amicus hereby notifies the Court that counsel for neither party authored the following brief, either in whole or in part, and that no person or entity other than the amicus curiae, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

(a) For the purposes of section 1110 of this title, and subject to the provisions of section 1113 of this title, in the case of any veteran who served for ninety days or more during a period of war –

(1) a chronic disease becoming manifest to a degree of 10 percent or more within one year from the date of separation from such service;

(2) a tropical disease, and the resultant disorders or disease originating because of therapy, administered in connection with such diseases, or as a preventative thereof, becoming manifest to a degree of 10 percent or more within one year from the date of separation from such service, or at a time when standard of accepted treatises indicate that the incubation period thereof commenced during such service;

(3) active tuberculous disease developing in a 10 percent degree of disability or more within three years from the date of separation from such service;

(4) multiple sclerosis developing a 10 percent degree of disability or more within seven years from the date of separation from such service;

(5) Hansen's disease developing a 10 percent degree of disability or more within three years from the date of separation from such service;

shall be considered to have been incurred in or aggravated by such service, notwithstanding there is no record of evidence of such disease during the period of service.

38 U.S.C. § 1137. Wartime presumptions for certain veterans.

For the purposes of this subchapter and subchapter V of this chapter and notwithstanding the provisions of sections 1132 and 1133 of this subchapter, the provisions of sections 1111, 1112, and 1113 of this chapter shall be applicable in the case of any veteran who served in the active military, naval, or air service after December 31, 1946.

38 U.S.C. § 1153. Aggravation.

A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

38 U.S.C. § 1154(b). Consideration to be accorded time, place, and circumstances of service.

In the case of any veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of

service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service-connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary. The reasons for granting or denying service-connection in each case shall be recorded in full.

38 U.S.C. § 5107. Burden of proof; benefit of the doubt.

(a) Except when otherwise provided by the Secretary in accordance with the provisions of this title, a person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 5106 of this title.

(b) When, after consideration of all evidence and material of record in a case before the Department with respect to benefits under laws administered by the Secretary, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be

given to the claimant. Nothing in this subsection shall be construed as shifting from the claimant to the Secretary the burden specified in subsection (a) of this section.

STATEMENT OF THE CASE

The Petitioner has fully laid out the Statement of the Case in his Petition for a Writ of Certiorari.

INTEREST OF THE AMICUS CURIAE

The National Organization of Veterans' Advocates ("NOVA") seeks to provide effective representation to anyone seeking benefits through the federal veterans' benefits system, with a focus on those who seek judicial review of veterans' benefits decisions. The 106 members of NOVA include both attorneys and non-attorneys, both veterans and people who have never served in the armed forces but nonetheless care deeply about the treatment of veterans in this country. All the members of NOVA are admitted to practice at the Court of Veterans Appeals.

NOVA takes many different approaches in its attempt to obtain effective representation for all veterans. For example, NOVA runs an advocate referral system, which connects veterans who want representation at the Court of Veterans Appeals with qualified attorneys who are willing to help them. NOVA also organizes and hosts two seminars annually, at which representatives from all over the country meet to learn about and discuss a wide variety of veterans' law issues. Throughout the year,

through newsletters, mailing lists, and phone calls, the members of NOVA actively research, study, and discuss veterans' law. Finally, NOVA files many amicus briefs each year, at both the United States Court of Veterans Appeals and the United States Court of Appeals for the Federal Circuit.

NOVA files this amicus brief because the resolution of the issue in this case, the proper standard for interpretation of statutes regarding veterans' benefits, will have a profound and far-reaching effect on all veterans applying for benefits administered under the statutory scheme provided by Congress. Consent has been granted for this brief.

SUMMARY OF THE ARGUMENT

The rule of statutory interpretation propounded in *Brown v. Gardner* that ambiguity in veterans statues must be resolved in favor of the veteran is consistent not only with this Court's previous decisions, but also with the general intent of the veterans' benefits statutory scheme as designed by Congress. That statutory scheme is designed to favor the veteran whenever possible, as is demonstrated by three different types of statutory provisions: the principle that all doubt is to be resolved in favor of the veteran; the Department of Veterans Affairs' statutorily mandated duty to assist the veteran in developing his claim; and the presence in the statutes of strong evidentiary presumptions in favor of the veteran.

ARGUMENT

This Court has repeatedly warned that " '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law[.]' " *United States Nat. Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)). In general, when interpreting a statute " 'the court will not merely look to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give it such construction as will carry into execution the will of the legislature[.]' " *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)). An examination of "the whole law" of veterans' benefits and its "objects and policy" clearly shows that when courts interpret veterans' benefits statutes, interpretive doubt should be resolved in favor of the veteran, for the substance of veterans' statutes is devoted to furthering the causes of veterans in a decidedly nonadversarial way.

For example, Congress has stipulated that when making decisions about whether a veteran is entitled to benefits, when the evidence is in equipoise, the benefit of the doubt is to be given to the veteran. 38 U.S.C. § 5107(b) (1998). The Court of Veterans Appeals has stated that the benefit of the doubt doctrine is "at the farthest end of the spectrum" of forms of standards of proof. *Gilbert v. Derwinski*, 1 Vet.App. 49, 54 (1990). For a veteran to prevail on a claim under this doctrine, there need be only an

"approximate balance of positive and negative evidence"; indeed, there must actually be a preponderance of evidence *against* the veteran's claim if benefits are to be denied. *Id.* "This unique standard of proof is in keeping with the high esteem in which our nation holds those who have served in the Armed Services. . . . By tradition and by statute, the benefit of the doubt belongs to the veteran." *Id. See, e.g., Alemany v. Brown*, 9 Vet.App. 518, 519-20 (1996); *Hayes v. Brown*, 9 Vet.App. 67, 74 (1996); *Smith v. Brown*, 8 Vet.App. 546, 554 (1996); *Caffrey v. Brown*, 6 Vet.App. 377, 382 (1994); *ZN v. Brown*, 6 Vet.App. 183, 195 (1994); *Ashley v. Brown*, 6 Vet.App. 52, 59 (1993); *Goodsell v. Brown*, 5 Vet.App. 36, 45 (1993). Obviously, the standard of statutory interpretation outlined in *Gardner v. Brown* is consistent with Congress's intent as evidenced by the benefit of the doubt doctrine outlined in § 5107(b).

Similarly, the Secretary of Veterans Affairs has a statutory duty to assist in the development of a claim for veterans' benefits. 38 U.S.C. § 5107(a) (1998); *see* H.R.Rep. No. 100-963, 100th Cong., 2d Sess. 13, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795 (Congressional statement of VA's duty to "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits"). This duty "arises out of the [Department of Veterans Affairs'] long tradition of *ex parte* proceedings and paternalism toward the veteran." *Connolly v. Derwinski*, 1 Vet.App. 566, 569 (1991).

The duty to assist confers many different responsibilities on the VA. For example, the duty to assist requires the VA to, when appropriate, conduct a thorough, contemporaneous medical examination. *See, e.g., Molloy v. Brown*, 9 Vet.App. 513, 517 (1996); *Perry v. Brown*,

9 Vet.App. 2, 6 (1996); *Suttman v. Brown*, 5 Vet.App. 127, 138 (1993); *Green (Victor) v. Derwinski*, 1 Vet.App. 121, 124 (1991). As well, the VA is required, in certain circumstances, to obtain medical records from either public or private medical facilities. *See, e.g., Sutton v. Brown*, 9 Vet.App. 553, 570 (1996); *Myore v. Brown*, 9 Vet.App. 498, 506 (1996); *Winn v. Brown*, 8 Vet.App. 510, 513-14 (1996); *Gregory v. Brown*, 8 Vet.App. 563, 570 (1996). The duty to assist may also encompass the duty to obtain records from other government agencies, such as the Social Security Administration. *See, e.g., Hayes*, 9 Vet.App. at 73-74; *Shoemaker v. Derwinski*, 3 Vet.App. 248, 253-54 (1992); *Murincsak v. Derwinski*, 2 Vet.App. 363, 373 (1992). In addition, the duty to assist requires the Secretary to read a claimant's claim documents in a liberal manner and to adjudicate of all claims that are reasonably raised by the evidence of record, whether or not those claims are formally claimed in a VA application. *Robinette v. Brown*, 8 Vet.App. 69, 76 (1995); *see EF v. Derwinski*, 1 Vet.App. 324, 326 (1991). The statutory duty to assist, in other words, places a great responsibility on the VA to help a veteran develop his claim.

Finally, Congress's statutory scheme for veterans' benefits includes various strong evidentiary presumptions in favor of granting the veteran's claim for benefits. For example, a veteran is presumed to have been in sound condition when he entered service if no defects were noted at the time of enlistment, absent clear and convincing evidence to the contrary. 38 U.S.C. § 1111 (1998)[2]. The burden of proof on the VA to rebut this

---

[2] Although this statute originally applied only to wartime veterans, 38 U.S.C. § 1137 extends the presumption afforded in

presumption is "formidable." *Kinnaman v. Principi*, 4 Vet.App. 20, 27 (1993); *see Crowe v. Brown*, 7 Vet.App. 238, 245 (1994). If a veteran contracts one of a list of certain diseases within certain lengths of time from discharge from service, he is presumed to have incurred that disease in service, even if there is no evidence of such disease during the period of service. 38 U.S.C. § 1112 (1998)[3]. A veteran who served in Vietnam during the Vietnam era and who contracts certain diseases is presumed to have contracted those diseases through exposure to Agent Orange, unless there is affirmative evidence that he was never exposed to Agent Orange. 38 U.S.C. § 1116 (1998). Whenever a veteran has a preexisting condition and that condition worsens during service, it is presumed that service aggravated that condition, even in the absence of affirmative evidence of aggravation. 38 U.S.C. § 1153 (1998). And a combat veteran's lay evidence stating that a disease or injury was incurred in service is sufficient to establish service-connection for that disease or injury, absent clear and convincing evidence to the contrary. 38 U.S.C. § 1154(b) (1998). Congress has clearly mandated that evidentiary gaps be resolved to the veteran's advantage in order to enhance the likelihood that benefits will be granted, rather than denied. This is obviously consistent with the rule of interpretation propounded in *Gardner*.

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this statute to any veteran who served in the active military, naval, or air service after December 31, 1946.

[3] Although this statute originally applied only to wartime veterans, 38 U.S.C. § 1137 extends the presumption afforded in this statute to any veteran who served in the active military, naval, or air service after December 31, 1946.

In conclusion, the statutory benefit of the doubt standard; the statutorily mandated duty to assist; and the presence in the statutory scheme of many strong evidentiary presumptions in favor of the veteran's claim all suggest that it is consistent with Congress's overall intent that, when a court is in doubt about the meaning of a statute, it should interpret that statute in favor of the veteran, as mandated by this Court's decision in *Brown v. Gardner*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 98-88

In the Supreme Court of the United States

OCTOBER TERM, 1997

RICHARD E. FLESHMAN, PETITIONER

v.

TOGO WEST, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly interpreted 38 U.S.C. 5101(a) in holding that petitioner's unsigned application for veterans disability benefits was not in the form prescribed by the Secretary, and therefore could not provide the basis for the effective date of his receipt of disability benefits.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Federal Circuit (Pet. App. 1a-11a) is reported at 138 F.3d 1429. The opinion of the United States Court of Veteran Appeals (Pet. App. 12a-22a) is reported at 9 Vet. App. 548. The opinion of the Board of Veterans' Appeals (Pet. App. 23a-33a) is unreported.

JURISDICTION

The judgment of the Federal Circuit was entered on March 11, 1998. On May 20, 1998, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 9, 1998. A petition for a writ of certiorari was filed on July 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner served in the United States Army from October 1984 to October 1987. Pet. App. 13a. On May 24, 1986, he fell from a repelling tower, sustaining injuries to his back and right leg. *Id.* at 2a. Petitioner subsequently returned to duty. *Ibid.* After completing the remaining eighteen months of his enlistment, he was honorably discharged in October 1987. *Ibid.* The same month, petitioner submitted, on a two-page form entitled "Veteran's Application for Compensation or Pension at Separation from Service," a claim for compensation to the Department of Veterans Affairs Regional Office (VA) in Cleveland. *Ibid.*

Although petitioner completed the first page of the form, he did not fill out the second page. Pet. App. 2a. Petitioner "therefore failed to complete the portion of the form calling for (1) his signature, certifying that the statements in the form were accurate and complete, and consenting to have any treating physicians furnish information to the Department of Veterans Affairs; (2) his mailing address; and (3) the date of execution of the form." *Ibid.*

The VA sent petitioner a letter requesting further information. Pet. App. 2a. Enclosed with the letter was petitioner's incomplete claim form, with check marks next to the boxes in which the missing information should have been included. *Ibid.* The letter asked petitioner to provide the information missing from the form and to return the completed form as soon as possible, and in any event within one year. *Ibid.* The letter specifically stated that, if the completed form was not returned to the VA within one year from the date of the letter, "benefits, if entitlement is established, may

not be paid prior to the date of [the form's] receipt." *Id.* at 2a-3a. Petitioner never returned the form. *Id.* at 3a.

In January 1992, petitioner submitted a new claim for compensation. Pet. App. 3a. The 1992 application, unlike the 1987 application, was signed, dated and bore a return address. *Ibid.* The VA Regional Office granted petitioner's claim effective January 30, 1992, "the day on which it received his application." *Ibid.*

2. Petitioner filed a Notice of Disagreement in July 1992, arguing that the effective date for his receipt of benefits should be the date that he submitted the unsigned application form in 1987. The Board of Veterans' Appeals (BVA) rejected that argument. The BVA concluded that the effective date was January 30, 1992, the date petitioner finally submitted a completed application. Pet. App. 30a-32a.

The BVA explained that, even though the VA "informed [petitioner] that his claim would be deemed extinguished and further processing would cease" if he did not return the completed form within one year, petitioner "never returned the form, and no further processing was accomplished in regard to his abandoned claim." Pet. App. 30a. Thus, because the completed claim was not received until more than one year after petitioner was separated from service, the date of that claim's receipt was the effective date of petitioner's claim under 38 U.S.C. 5110. Pet. App. 31a-32a.

The BVA also rejected petitioner's assertion that the VA did not meet its statutory duty to assist him by not processing the incomplete claim form. The "duty to assist," stated the BVA, "is not a one way street"; it does not entitle a veteran to "wait passively" for help from the VA. Pet. App. 32a. Because petitioner's "failure to return a completed claim form despite the [Regional Office]'s request constituted abandonment of that

claim," it "did not give rise to any further duty to assist" petitioner on the part of the VA. *Ibid.*

3. Petitioner timely appealed the decision of the BVA to the Court of Veteran Appeals (CVA). That court also rejected petitioner's claim that the effective date should be the date on which he submitted the unsigned application. The CVA noted that 38 U.S.C. 5101(a) requires a specific claim to be "in the form prescribed by the Secretary." Pet. App. 17a. Absent a signature and the other requested information, the court found, the 1987 claim form was simply an informal claim for benefits. *Id.* at 17a-19a. The CVA further found that under 38 C.F.R. 3.155(a) (1995), the VA acted properly by sending petitioner the incomplete form for execution, Pet. App. 18a, and that the "unexecuted claim form * * * would not have been in the form prescribed by the Secretary until [petitioner] returned it with the requested information." *Ibid.*

4. Petitioner then appealed to the United States Court of Appeals for the Federal Circuit, which affirmed the decision of the CVA. The Federal Circuit interpreted the phrase "in the form prescribed by the Secretary" in Section 5101(a) as requiring an applicant "to submit a claim in a particular format, containing specified information, and signed by the claimant, as called for by the blocks on the application form." Pet. App. 5a. It found that petitioner did not provide "critical elements of the information requested on the form" in 1987, *ibid.*, even though the VA returned the form to him in order to obtain that information. *Id.* at 7a-8a. Thus, the court ruled, the effective date for petitioner's receipt of benefits could not be based on his incomplete 1987 application. *Ibid.*

ARGUMENT

Neither of the questions raised by the petition was presented to or discussed by the court of appeals. Moreover, the decision of the Federal Circuit that petitioner's 1987 application was not "in the form prescribed by the Secretary" under 38 U.S.C. 5101 and therefore could not provide a basis for an earlier effective date for his disability benefits is correct and does not conflict with any decision of this Court. Accordingly, further review of this case is not warranted.

1. Question one in the petition is based upon a purported conflict between the *Chevron* doctrine, see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the canon of statutory construction that veterans' statutes "are to be construed in the beneficiaries' favor," see *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991); *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Petitioner contends that the Federal Circuit erred when, following *Chevron*, it resolved this alleged conflict in the Secretary's favor. This contention has no merit.

a. The issue of a possible conflict between *Chevron* and the canon of statutory construction referred to in *King* and *Gardner* is not presented by this case. The Federal Circuit neither addressed nor decided such an issue in its opinion. Indeed, nowhere in its decision did the court even refer to *Chevron* or in any way defer to the VA's interpretation of Section 5101(a), let alone "rule" (Pet. i) that the interpretation was entitled to *Chevron* deference. This is because the court interpreted the clear and unambiguous language of the statute *de novo* and thus had no occasion to resort to the VA's interpretation for guidance. For this reason alone the petition should be denied. See, *e.g.*, *Taylor* v.

Freeland & Kronz, 503 U.S. 638, 646 (1992); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

b. Moreover, the Federal Circuit was correct in deciding the case without adverting either to *Chevron* deference or to the *King-Gardner* canon of statutory construction, because neither principle applies when, as here, Congress has made its intent clear through the plain language of the statute. Thus this Court stated in *Chevron*: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-843. See also *Jones* v. *West*, 136 F.3d 1296, 1299 n.2 (Fed. Cir. 1998) ("[G]iven the plain meaning of the statutory provisions at issue, it is irrelevant for purposes of this appeal whether deference is warranted under *Chevron* * * *. For similar reasons, the mandate of *Brown* v. *Gardner* * * *, that 'interpretive doubt is to be resolved in the veterans' favor,' has no bearing on the resolution of this case.") (citations omitted), petition for cert. pending, No. 97-9025.

Similarly, although *King* contains reference to the canon of statutory construction relating to veterans' statutes, the Court there ultimately based its decision on the "plain" meaning of 38 U.S.C. 2024(d). 502 U.S. at 221. And *Gardner* itself explains that, unless an ambiguity exists in construing a statute, the canon supporting construction of the statute in favor of the veteran beneficiaries does not apply. 513 U.S. at 118; see also *Smith* v. *Brown*, 35 F.3d 1516, 1525 (Fed. Cir. 1994) ("[A] canon of broad construction comes into play only if the meaning of the text is doubtful. Otherwise there is no room for such construction, and the court must

give effect to the clearly expressed intent of the legislative authority.").

Petitioner has not demonstrated that Section 5101(a) is ambiguous, or that the Federal Circuit (and the CVA) incorrectly construed the plain meaning of the statute. Section 5101(a) provides: "A specific claim *in the form prescribed by the Secretary* * * * must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary" (emphasis added). Clearly, by its terms, the statute requires an application "*in* the form," not *on* the form or *using* the form, prescribed by the Secretary. Put another way, the term "in the form prescribed" refers not to the submission of a particular piece of paper, but rather to a claim in a particular format, containing specified information, and signed by the claimant, as called for by the blocks of the application. It is not enough, as petitioner asserts, to file a copy of the form provided by the VA without completing all of the pertinent sections. Instead, as the Federal Circuit concluded, petitioner was required to submit his claim "in a particular format, containing specified information," and with his signature, as suggested by the application form. Pet. App. 5a. That conclusion was correct; no reason exists to review it further.

2. Question 2 in the petition was likewise not presented to the court below, and likewise does not merit further review. Petitioner claims that the Federal Circuit erred when it concluded that his unsigned application was not an application within the meaning of Section 5110 for the purpose of establishing the effective date of petitioner's disability benefits. Petitioner contends that Section 5101, requiring applications "in the form prescribed by the Secretary," does not apply to his application, because within Section

5110, entitled "Effective dates of awards," Section 5101 is specifically mentioned in Section 5110(g), which does not apply to his case, and not in Section 5110(b), which does.

a. Petitioner never raised this argument below and, consequently, the court of appeals never addressed it. Thus petitioner is now barred from raising it before this Court under the long-standing principle that arguments not raised below by the appellant will not be considered by the reviewing Court for the first time upon appeal. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *Ramsey* v. *United Mine Workers*, 401 U.S. 302, 312 (1971); *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *Wallace* v. *Department of the Air Force*, 879 F.2d 829, 832 (Fed. Cir. 1989).

b. Petitioner's argument is, at any rate, incorrect. Section 5110(g) "deals with the effective dates of awards, and, with regard to compensation and pension claims, sets the effective date for awards or increases made 'pursuant to any Act or administrative issue.'" *Routen* v. *West*, 142 F.3d 1434, 1441 (Fed. Cir. 1998), petition for cert pending, No. 98-147. The purpose of the statute is to provide for the situation of veterans who have claims pending when the substantive law changes in a manner that would benefit them; Section 5110(g) obviates the need for such veterans to file *another* claim *after* the change. See *McCay* v. *Brown*, 106 F.3d 1577, 1580 (Fed. Cir. 1997). Even so, the submission of an application in the form prescribed by the Secretary is still a prerequisite for entitlement to any award under that section, as it is under any part of Section 5110. This is because Section 5110 merely establishes rules for the determination of effective dates where the statutory prerequisites for entitlement

have been satisfied. Inclusion of a specific reference to section 5101 in Section 5110(g) serves to make clear that, although Section 5110(g) contemplates that the VA may act on its own to identify claimants who may be entitled to benefits as a result of a change in law, see *McCay*, 106 F.3d at 1580, an application remains a prerequisite for entitlement. The reference has no bearing on the meaning of "application" in Section 5110(b). That word means the same thing in both Section 5110(b) and 5110(g).

At bottom, petitioner's argument is simply an unsuccessful attempt to avoid the plain meaning of Section 5101, which requires the application to be in the form prescribed by the Secretary before an effective date for benefits can be established. Indeed, when what is sought here—the veteran's signature—is completely within his control to provide, the agency can do no more than send the form to the veteran and, giving him ample time, ask him to complete it. See, *e.g.*, *Edenfield* v. *Brown*, 8 Vet. App. 384, 389 (1995). *McTighe* v. *Brown*, cited by petitioner, is not to the contrary. In *McTighe*, the claimant did not file an application for benefits for several years because of incorrect advice given to her by a veterans benefits counselor. 7 Vet. App. 29, 30 (1994). The court held that even if her failure to file a claim "in the form prescribed by the Secretary" resulted from the erroneous advice, she still was not entitled to benefits from an earlier effective date. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

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RICHARD E. FLESHMAN,

Petitioner,

v.

TOGO D. WEST, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

One of the most common tactics employed by respondents to defeat a Petition for Certiorari is to divert attention from certworthy issues by throwing up a host of purported procedural obstacles to review. The Brief in Opposition filed by the Solicitor General on behalf of the Secretary of Veterans Affairs in this matter is a case in point. Rather than make a serious attempt to confront the two issues raised in the Petition – which are important to the proper administration of the veterans benefits statutes – the Solicitor General erroneously asserts that *neither* of those issues is presented in this case.

Ultimately, however, the Brief in Opposition is more revealing for what it does *not* say rather than what it does say. Even the Solicitor General cannot bring himself to deny that question one, which involves the resolution of a noted conflict in this Court's cases concerning in whose favor (the claimant's or the government's) courts should resolve ambiguity in the veterans statutes, presents a certworthy issue ripe for resolution by this Court. Likewise, the Solicitor General makes no attempt to defend the Federal Circuit's rule of law that the government should win in cases of ambiguity – a rule that is decidedly contrary to this Court's "rule" that "interpretive doubt is to be resolved in *the veteran's* favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (emphasis added). Once the Solicitor General's waiver arguments are revealed for what they are – a smokescreen – it becomes possible to understand the importance of the basic issue presented. The Petition should be granted.

1. The Solicitor General's two waiver arguments can be dispatched in short order.

a. He first argues (Opp. 5) that the conflict between the rule of *Brown v. Gardner* and the general rule of deference to administrative agencies, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "is not presented by this case." This is so, in his view, because "[t]he Federal Circuit neither addressed nor decided such an issue in its opinion." Opp. 5. This is both irrelevant and untrue.

The fact of the matter is that there was no need for the Court to expound upon (or even reference) this conflict because, as noted without contravention in the Petition (14-15), the Federal Circuit has *already* resolved that conflict in favor of deference and against the veteran. See, *e.g., Degmetich v. Brown*, 104 F.3d 1328, 1332 (Fed. Cir. 1997) (employing *Chevron* deference as basis for rejecting veteran's interpretation of an ambiguous provision of the veterans statutes). It makes little sense to oppose the Petition on the ground that the decision below did not "decide[ ]" (Opp. 5) a question that the Circuit has already decided. Naturally, it is to be presumed that the panel decided this case in accordance with established Circuit precedent, which will remain binding absent intervention by this Court.

The Solicitor General's naked assertion (Opp. 5) that the Federal Circuit did not "in any way defer to the VA's interpretation of [38 U.S.C.] Section 5101(a)" is refuted by the court of appeals' own opinion. The court below rejected Mr. Fleshman's interpretation of the statute, not

based on any "clear and unambiguous language" (Opp. 5), but rather because his interpretation was not "compelled" by the text of the statute. Pet. App. 5a. Under "the rule that interpretive doubt is to be resolved in the veteran's favor" (*Gardner*, 513 U.S. at 118), however, it is the *government's* interpretation – not the veteran's – that must be "compelled" by the statute to be sustained.

Moreover, although the Solicitor General prefers to ignore the point, the court of appeals rejected Mr. Fleshman's contentions because, in its view, "the [VA] Secretary *reasonably regarded* [a signature] as necessary to enable the agency to process the claim." Pet. App. 7a (emphasis added). This, of course, is the very language of *Chevron* deference (see, *e.g.*, 467 U.S. at 842) – which explains why the Solicitor General has swept it under the rug. The court therefore *did* defer to the VA's reading of § 5101(a), as was only proper under settled precedent from the Federal Circuit. Having done so, there can be no question of this Court's authority to review that Circuit precedent for consistency with controlling decisions from this Court, particularly where, as here, those decisions in themselves are in conflict. Needless to say, only this Court can authoritatively resolve a conflict in its cases.

b. The Solicitor General's other waiver argument – that question two was not raised below – is simply baffling. This *entire* case, from the administrative phase to the Court, has been an effort by Mr. Fleshman to obtain an earlier effective date for his disability benefits pursuant to 38 U.S.C. § 5110(b)(1). That statute provides that an award of benefits is to be effective as of the date following the veteran's discharge from active duty, rather than the date on which an application is received, "if

application therefore is received within one year from such date of discharge." *Id.* At *every* level of this case, Mr. Fleshman has argued that section 5110(b)(1) governs because his original unsigned application was received within that time period.

For instance, Mr. Fleshman faulted the VA for "not apply[ing] § 5110(b)(1)" and argued that "the application of § 5110(b)(1) would result in the October 9, 1987 effective date Mr. Fleshman seeks in this proceeding because his initial application was filed within one year (indeed, within one month) of his honorable discharge from the Army." Opening Brief for Appellant, Fed. Cir. No. 97-7029, at 14 (filed April 15, 1997). After attacking several grounds relied upon by the Court of Veterans Appeals ("CVA") for not applying section 5110(b)(1), Mr. Fleshman turned to the meaning of "application" as used in that subsection: "[B]y virtue of the presumption that Congress ordinarily uses words in their plain usage, as reflected in dictionary definitions, the meaning of 'application' becomes clear: In this context, an 'application' is '[a] request, as for assistance, employment, or admission to a school.' *Despite the lack of signature, application date, and mailing address, Mr. Fleshman's 1987 application clearly constituted a 'request' for benefits, and so he is entitled to the October 1987 effective date*[.]" *Id.* at 23 (emphasis added; citations omitted).

Finally, consistent with his common-sense view that an unsigned application is nevertheless an "application," Mr. Fleshman prayed that the CVA's decision denying him an October 9, 1987, be reversed "with instructions to award him disability benefits retroactive to that date from January 30, 1992," the date of his second application. *Id.*

at 33. In light of these (and other) unequivocal claims by Mr. Fleshman to an effective date pursuant to section 5110(b)(1), the Solicitor General's assertion that question two was not raised below is, to say the least, puzzling indeed.

2. Rather than reargue the merits of the questions presented at this juncture, several observations are appropriate in closing. First, the Solicitor General does not dispute the importance of question one to the proper administration of the veterans benefits laws. Second, in like manner, he makes no argument whatsoever in opposition to Mr. Fleshman's showing (Pet. 11-15) that the rules of *Chevron* and *Brown v. Gardner* are in flat – and *acknowledged* (*Gardner*, 513 U.S. at 117-18) – conflict. With the importance of this certworthy issue all but conceded by the Solicitor General, Mr. Fleshman respectfully submits that a writ of certiorari should issue in this case to decide, once and for all, whether veterans, who have served their country at great sacrifice and often at great risk to their personal safety, should be granted the benefit of the doubt when the fate of their applications for benefits turns on ambiguous statutes.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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